Lembaga Hasil Dalam Negeri v Kang Keng Tee & Anor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NOS 43–5 OF 2009 AND 43–6 OF 2009
MOHD AMIN FIRDAUS JC
3 JUNE 2010

Constitutional Law — Attorney general — Power to institute, conduct or discontinue proceedings — Proceedings in respect of offences under the Inland Revenue Board of Malaysia Act 1995 — Whether implied that attorney general or representative on the Inland Revenue Board had given discretion to Inland Revenue Board to institute and conduct proceedings — Whether consent of public prosecutor required for institution and conduct of proceedings — Whether request for consent at discretion of Inland Revenue Board

Criminal Procedure — Consent or sanction — Consent — Proceedings in respect of offences under the Inland Revenue Board of Malaysia Act 1995 — Institution and conduct of — Whether officer of Inland Revenue Board empowered to carry out proceedings — Whether consent of public prosecutor required for the institution and conduct of proceedings — Whether request for consent at the discretion of the Inland Revenue Board

Words and Phrases — 'discretion' — Federal Constitution art 145(3)

Words and Phrases — 'may' — Inland Revenue Board of Malaysia Act 1995 s 30(1)

Words and Phrases — 'proceedings' — Inland Revenue Board of Malaysia Act 1995 s 30(1)

Both the accused persons were charged in the magistrates' court with multiple offences under the Income Tax Act 1967. Just before the commencement of their trials, counsel for both the accused raised a preliminary objection. Counsel submitted that the Director General of Inland Revenue ('the DGIR') did not have the power to institute any criminal proceeding against both the accused. Counsel contended that only the public prosecutor was vested with the power to institute, conduct and discontinue criminal proceedings under art 145(3) of the Federal Constitution ('Constitution'). Counsel further submitted that the DGIR had no power to institute any

criminal proceedings except with the previous sanction of the public prosecutor, but in the instant case, no such sanction had been obtained making the proceedings unconstitutional, null and void. The magistrate referred the case to the High Court pursuant to s 30 of the Courts of Judicature Act 1964. The issue for the High Court was: bearing in mind art 145(3) of the Constitution, was the Inland Revenue Board ('the IRB') conferred discretion by the Inland Revenue Board of Malaysia Act 1995 ('IRB Act') to institute court proceedings without having first to obtain authorisation from the public prosecutor.

Held, dismissing the preliminary objection:

(1) Section s 30(1) of the IRB Act provides, inter alia, that proceedings in respect of any offence may with the consent of the public prosecutor be carried out by an officer of the Board. The word 'may' in s 30(1) of the IRB Act carries a directory and not mandatory meaning. The word 'proceedings' in the same provision includes the institution of criminal proceedings and the conduct of such proceedings (see paras 10, 35–36); *Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Semenanjung Malaysia & Anor* [2000] MLJU 825 referred; *Kekatong Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1998] 2 MLJ 440 followed.

(2) The use of the word 'discretion' in art 145 (3) of the Federal Constitution only means that Parliament had empowered the attorney general with the discretion either to exercise the power therein or to delegate it to his subordinate officer or to an authorised head of a government department or body, though subject to the powers of the public prosecutor. It is not pragmatic for the attorney general to alone exercise such power. The IRB is thus given discretion when instituting proceedings in respect of any offence under the IRB Act or any related provision, on the need to request for the public prosecutor's consent. It is not mandatory for the IRB to first seek such consent, sanction or written authorisation (see paras 39–41).

(3) By virtue of ss 6 and 10 of the IRB Act, it is implied that attorney general or his representative on the IRB Board had given discretion to the IRB to institute and conduct the proceedings under s 30(1) of the IRB Act, though that power is subject to the powers of the public prosecutor under art 145(3) of the Constitution (see para 44).

(4) The charges against both the accused persons are not unconstitutional and they did not violate art 145(3) of the Constitution. The preliminary objection raised in both the trials ought to be dismissed and the cases remitted to the magistrates' court for trial (see paras 48–49).

[Bahasa Malaysia summary

Kedua-dua tertuduh dituduh di mahkamah majistret dengan pelbagai kesalahan di bawah Akta Cukai Pendapatan 1967. Sebelum permulaan perbicaraan mereka, peguam kedua-dua tertuduh membangkitkan bantahan awalan. Peguam berhujah bahawa Ketua Pengarah Hasil Dalam Negeri ('KPHDN') tidak mempunyai kuasa untuk memulakan apa-apa prosiding jenayah terhadap kedua-dua tertuduh. Peguam berhujah bahawa hanya pendakwa raya diletakhakkan dengan kuasa untuk memulakan, melaksanakan dan untuk menamatkan prosiding jenayah di bawah perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan'). Peguam selanjutnya berhujah bahawa KPHDN tidak mempunyai kuasa untuk memulakan apa-apa prosiding jenayah kecuali dengan sanksi terdahulu pendakwa raya, tetapi di dalam kes ini, tidak terdapat sanksi sedemikian diperolehi membuatkan prosiding tersebut tidak berperlembagaan, batal dan tidak sah. Majistret merujuk kes kepada Mahkamah Tinggi berikutan s 30 Akta Mahkamah Kehakiman 1964. Isu untuk Mahkamah Tinggi adalah: mengambilkira perkara 145(3) Perlembagaan, sama ada Lembaga Hasil Dalam Negeri ('LHDN') diberikan budi bicara oleh Akta Lembaga Hasil Dalam Negeri Malaysia 1995 ('Akta') untuk memulakan prosiding mahkamah tanpa memperoleh terdahulu pemberian kuasa daripada pendakwa raya.

Diputuskan, menolak bantahan awalan:

(1) Seksyen s 30(1) Akta memperuntukkan, antara lain, bahawa prosiding berkaitan apa-apa kesalahan dengan keizinan pendakwa raya dilaksanakan oleh pegawai Lembaga. Perkataan 'may' di dalam s 30(1) Akta membawa maksud direktori dan bukan mandatori. Perkataan 'proceedings' di dalam peruntukan yang sama termasuk permulaan prosiding jenayah dan perlaksanaan prosiding sedemikian (lihat perenggan 10, 35–36); *Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Semenanjung Malaysia & Anor* [2000] MLJU 825 dirujuk; *Kekatong Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1998] 2 MLJ 440 diikut.

(2) Penggunaan perkataan 'discretion' di dalam perkara 145(3) Perlembagaan hanya bermaksud bahawa Parlimen telah memberikan kuasa kepada peguam negara dengan budi bicara sama ada untuk menjalankan kuasa di dalamnya atau untuk mewakilkannya kepada pegawai bawahan atau kepada ketua jabatan kerajaan atau badan yang diberi kuasa, walaupun tertakluk kepada kuasa-kuasa pendakwa raya. Ia tidak pragmatik untuk peguam negara sendirian melaksanakan kuasa sedemikian. LHDN oleh itu diberi budi bicara apabila memulakan prosiding-prosiding berkaitan apa-apa kesalahan di bawah Akta atau apa-apa peruntukan yang berkaitan, atas keperluan untuk mendapatkan keizinan pendakwa raya. Ia tidak mandatori untuk LHDN

mendapatkan terdahulu keizinan, sanksi atau pemberian kuasa bertulis sedemikian (lihat perenggan 39–41).

(3) Mengikut ss 6 dan 10 Akta, ia adalah tersirat bahawa peguam negara atau wakilnya di Lembaga LHDN telah memberikan budi bicara kepada LHDN untuk memulakan dan menjalankan prosiding-prosiding di bawah s 30(1) Akta, walaupun kuasa tersebut tertakluk kepada kuasa-kuasa pendakwa raya di bawah perkara 145(3) Perlembagaan (lihat perenggan 44).

(4) Tuduhan-tuduhan terhadap kedua-dua tertuduh tidak berperlembagaan dan mereka tidak mencabuli perkara 145(3) Perlembagaan. Bantahan awalan yang dibangkitkan di dalam kedua-dua perbicaraan patut ditolak dan kes-kes diremit ke mahkamah majistret untuk perbicaraan (lihat perenggan 48–49).]

Notes

For cases on attorney general generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1878–1885.

For cases on consent, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1468–1507.

Cases referred to

Hassan bin Isahak v PP [1948–1949] MLJ Supp 179 (refd)
Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd [1998] 2 MLJ 440; [1998] 2 CLJ 266, CA (folld)
Kyohei Hosoi v PP [1997] MLJU 467; [1998] 1 CLJ 1063, HC (refd)
Nguang Chan Sdn Bhd v PP [2001] 2 MLJ 129, CA (refd)
Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Semenanjung Malaysia & Anor [2000] MLJU 825; [2001] 8 CLJ 416, HC (refd)
Pai San & Ors v PP [2002] 4 MLJ 538; [2002] 4 CLJ 547, CA (refd)
Perumal v PP [1970] 2 MLJ 265, FC (refd)
PP v Chan Kam Leong [1989] 1 MLJ 326, HC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116, HC (refd)
PP v Lim Shui Wang & Ors [1979] 1 MLJ 65, FC (refd)
PP v Syarikat Tekala Sdn Bhd [2007] 6 MLJ 500, CA (refd)
Quek Gin Hong v PP [1998] 4 MLJ 161, HC (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681, HC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 30
Criminal Procedure Code ss 129(1), 376, 376(1), (3), 377, 377(b), 422
Federal Constitution art 145(3)
Income Tax Act 1967 ss 114, 114(1)(a), 134(2)

Inland Revenue Board of Malaysia Act 1995 ss 6, 6(1), 10, 10(d), 30(1), Second Schedule

Umma Devi Loganathan (Legal Advisor, Pulau Pinang) for the prosecution.
Vijayaretnam (Veizay & Co) for the accused.

Mohd Amin Firdaus JC:

BACKGROUND

[1] The accused named Kang Keng Tee (No IC 610221–07–5478) in Criminal Revision No 43–5 of 2010 faces the following charges in the subordinate court:

(1) Bahawa kamu KANG KENG TEE (K/P: 610221–07–5478) pada 27 April 2005 secara sengaja dan dengan niat untuk mengelak cukai meninggalkan pendapatan bercukai daripada keuntungan bersih Perkongsian Genial Packer Trading Co. berjumlah RM3,360,851.00 yang sepatutnya dimasukkan ke dalam borang nyata Tahun Taksiran 2004 yang boleh dikenakan cukai sebanyak RM931,023.03 dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 114(1)(a) Cukai Pendapatan 1967 akta yang sama.

(b) Bahawa kamu KANG KENG TEE (K/P: 610221–07–5478) setelah dikehendaki di bawah seksyen 82(1) Akta Cukai Pendapatan, 1967 untuk menyimpan dan memegang simpan dalam jagaan yang selamat rekod-rekod yang mencukupi berkenaan pendapatan atau kerugian larasan daripada perniagaan kamu bagi tempoh tujuh tahun daripada tarikh akhir tahun tersebut telah gagal menyimpan dan memegang simpan dalam jagaan yang selamat invois belian/jualan dan buku akaun bagi tahun berakhir 31 Disember 2003 dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 119A(b) Akta Cukai Pendapatan 1967 dan boleh dihukum di bawah seksyen 119A Akta yang sama.

(c) Bahawa kamu KANG KENG TEE (K/P: 610221–07–5478) setelah dikehendaki di bawah seksyen 82(1) Akta Cukai Pendapatan, 1967 untuk menyimpan dan memegang simpan dalam jagaan yang selamat rekod-rekod yang mencukupi berkenaan pendapatan atau kerugian larasan daripada perniagaan kamu bagi tempoh tujuh tahun daripada tarikh akhir tahun tersebut telah gagal menyimpan dan memegang simpan dalam jagaan yang selamat invois belian/jualan dan buku akaun bagi tahun berakhir 31 Disember 2004 dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 119A(b) Akta Cukai Pendapatan 1967 dan boleh dihukum di bawah seksyen 119A Akta yang sama. dan

(d) Bahawa kamu KANG KENG TEE (K/P: 610221–07–5478) pada 8 April 2004 secara sengaja dan dengan niat untuk mengelak cukai meninggalkan pendapatan bercukai daripada keuntungan bersih Perkongsian Genial Packer Trading Co. berjumlah RM2,610,067.00 yang sepatutnya dimasukkan ke

dalam borang nyata Tahun Taksiran 2003 yang boleh dikenakan cukai sebanyak RM720,568.76 dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 114(1)(a) Cukai Pendapatan 1967 akta yang sama.

[2] The accused named Ooi Lay See (No IC 710918–07–5230) in Criminal Revision No 43–6 of 2010 faces the following charges:

(a) Bahawa kamu OOI LAY SEE (K/P: 710918–07–5230) pada 8 April 2004 secara sengaja dan dengan niat untuk mengelak cukai meninggalkan pendapatan bercukai daripada keuntungan bersih Perkongsian Genial Packer Trading Co. berjumlah RM2,610,067.00 yang sepatutnya dimasukkan ke dalam borang nyata Tahun Taksiran 2003 yang boleh dikenakan cukai sebanyak RM729,421.53 dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 114(1)(a) Cukai Pendapatan 1967 akta yang sama.

(b) Bahawa kamu OOI LAY SEE (K/P: 710918–07–5230) pada 27 April 2005 secara sengaja dan dengan niat untuk mengelak cukai meninggalkan pendapatan bercukai daripada keuntungan bersih Perkongsian Genial Packer Trading Co. berjumlah RM3,360,851.00 yang sepatutnya dimasukkan ke dalam borang nyata Tahun Taksiran 2004 yang boleh dikenakan cukai sebanyak RM934,095.22 dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 114(1)(a) Cukai Pendapatan 1967 akta yang sama.

(c) Bahawa kamu, OOI LAY SEE (K/P: 710918–07–5230) sebagai kongsi utama Genial Packer Trading Co. setelah dikehendaki di bawah seksyen 86(1)(a) Akta Cukai Pendapatan, 1967 untuk mengemukakan suatu penyata di dalam Borang P bagi Tahun Taksiran 2003 pada atau sebelum 30 April 2004 kepada Ketua Pengarah Hasil Dalam Negeri dengan tiada sebab yang munasabah telah gagal mengemukakan penyata tersebut dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 120(1)(d) Akta Cukai Pendapatan 1967 dan boleh dihukum di bawah seksyen 120(1) Akta yang sama.

(d) Bahawa kamu, OOI LAY SEE (K/P: 710918–07–5230) sebagai kongsi utama Genial Packer Trading Co. setelah dikehendaki di bawah seksyen 86(1)(a) Akta Cukai Pendapatan, 1967 untuk mengemukakan suatu penyata di dalam Borang P bagi Tahun Taksiran 2004 pada atau sebelum 30 April 2005 kepada Ketua Pengarah Hasil Dalam Negeri dengan tiada sebab yang munasabah telah gagal mengemukakan penyata tersebut dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 120(1)(d) Akta Cukai Pendapatan 1967 dan boleh dihukum di bawah seksyen 120(1) Akta yang sama.

PRELIMINARY OBJECTION

[3] These two cases revolved around the same issue. Learned counsel for

both the accused/defendants raised a preliminary objection in the magistrates' court before the commencement of the trial on the 12 March 2010 on the ground that the Director General of Inland Revenue does not have the power to institute any criminal proceedings against both his clients, based on the following reasons:

(a) Only the public prosecutor is vested with the power to institute, conduct and discontinue any proceedings, for an offence empowered by art 145(3) of the Federal Constitution other than proceedings before a Syariah Court, a native court or a court-martial. Article 145(3) of the Federal Constitution lays down that:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

(b) The director general does not have the power to institute any criminal proceedings except with the sanction of the public prosecutor.

(c) In the present case no previous sanction has been obtained by the director general and thus it is unconstitutional, null and void.

[4] The learned magistrate now refers this case to the High Court for the determination of the issue based on s 30 of the Courts of Judicature Act 1964 (Act 91) concerning a reference of constitutional question submitted by the subordinate court.

ARGUMENT OF LEARNED COUNSEL

[5] Since the corporatisation of the Inland Revenue Department as the Inland Revenue Board on 16 February 1995, all the legal officers from the Attorney General's Chambers who were then serving the Inland Revenue Department and were gazetted officers under s 376(3) of the Criminal Procedure Code, were absorbed into the Inland Revenue Board (IRB).

[6] They are now known as revenue counsel, senior revenue counsel, head of revenue solicitors, deputy revenue solicitors, and ceased to be gazetted officers under the same section of the Criminal Procedure Code. Please see s 134(2) of the Income Tax Act 1967 (Act 53) which provides for the appointment of such officers by notification in the *Gazette* after consultation with the Director General of Inland Revenue.

[7] Section 376(3) of the said Code states that:

376 Public Prosecutor

(3) The Public Prosecutor may appoint fit and proper persons to be Deputy

A Public Prosecutor who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the right and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any right or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutor as Senior Deputy Public Prosecutors.

B

[8] Learned counsel contended that after s 134(2) took effect, these officers now do not possess the power given to them by s 376(3) of the Criminal Procedure Code. Instead they are presently employed directly by the Inland C Revenue Board.

[9] He referred to s 30(1) of the Inland Revenue Board of Malaysia Act 1995 (Act 533) which states that:

D Proceedings in respect of any offence under this Act or any regulations made thereunder or any of the Acts specified in the Second Schedule or any subsidiary legislation made under any of those Acts may with the consent of the Public Prosecutor, be conducted by an officer of the Board who is authorized to conduct such proceedings by the Director General, as the case may be.

E

[10] He submitted that it is very clear that the IRB is not given the power to institute any criminal proceedings except to conduct proceedings with the consent of the public prosecutor.

F **[11]** The cases of *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, *Perumal v Public Prosecutor* [1970] 2 MLJ 265 and *Public Prosecutor v Lim Shui Wang & Ors* [1979] 1 MLJ 65 were cited to illustrate the meaning of 'institute'.

G **[12]** *Public Prosecutor v Chan Kam Leong* [1989] 1 MLJ 326 and *Quek Gin Hong v Public Prosecutor* [1998] 4 MLJ 161 were also cited to depict the power of the public prosecutor within this said domain.

H **[13]** Learned counsel also referred to s 376(1) of the Criminal Procedure Code to show that the attorney general shall be the public prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

I **[14]** The Court of Appeal case of *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2 MLJ 129, *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 and *Public Prosecutor v Syarikat Tekala Sdn Bhd* [2007] 6 MLJ 500 were also referred to support the provision of art 145(3) of the Federal Constitution.

[15] He also argued that s 422 of the Criminal Procedure Code does not cure the absence of a written sanction or consent. This provision cannot save IRB as there is no requirement for sanction or consent under the Income Tax Act 1967 (Act 53). The cited case of *Quek Gin Hong* was again referred to support his contention. The cases of *Hassan bin Isahak v Public Prosecutor* [1948–1949] MLJ Supp 179 and *Kyohei Hosoi v Public Prosecutor* [1997] MLJU 467; [1998] 1 CLJ 1063 were also referred by him to show that there was no authorisation obtained from the public prosecutor and thus the prosecution in these two cases was not valid.

[16] Summing up, learned counsel pointed out that the punishment for an offence under s 114(1)(a) of the Income Tax Act 1967 is punishable with a maximum of three year imprisonment and a special penalty of treble the amount of tax undercharged. Hence, 'It is a serious offence, the papers shall have been perused by the highest legal brain, the PP. No prosecution can be instituted without his consent'.

[17] It can be implied from the argument that the bottom line is that without any provision enshrined in the Income Tax Act of 1967 to obtain sanction or consent from the attorney general, the institution of the present proceedings against the accused, was done without the opportunity being given to the attorney general to apply his mind to the investigation papers in regard to the charges preferred against the accused.

[18] Thus, the charges against the accused are illegal and unconstitutional. They contravened art 145(3) of the Federal Constitution.

ARGUMENT OF THE PROSECUTING OFFICER

[19] In a nutshell, the diligent prosecuting officer tried to ward off the preliminary objection ('PO') raised by learned counsel by counter arguing (if this court understands him correctly) that the PO was made too hastily without giving the prosecution the opportunity to adduce proof that IRB is actually clothed with the power to handle the prosecution in this case against the accused.

[20] The prosecution in fact has been empowered to carry out the prosecution by the letter/document of authorisation dated 5 July 2002 given under s 377(b) of the Criminal Procedure Code as seen on p 33 of the notes of evidence of the proceedings in the lower court.

[21] The letter dated 12 March 2008 to the attorney general from the Director General of the Inland Revenue Board and the reply from him dated 4 April 2008 are relevant to the issue.

[22] It was argued that both the said letter and the reply in both cases must be read together and the answer 'Meneruskan dengan pendakwaan kes-kes ke Mahkamah seperti biasa' is likened to consent from the attorney general to initiate the prosecution as done by the Inland Revenue Board before all this while. The answer from the Attorney General's Chambers is clear that the deputy public prosecutor concerned had carried out her duty in accordance with art 145(3) of the Federal Constitution read together with ss 376 and 377 of the Criminal Procedure Code.

[23] If the IRB had acted contrary to the directive given by the attorney general as seen in its letter dated 4 April 2008, then it could be said that the present proceedings is ultra vires and not in accordance with art 145(3) resulting in this case being illegal as what had happened to the *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681.

[24] It was further argued that 'Pemberian Kuasa' under s 377 (b) of the Criminal Procedure Code given by the deputy public prosecutor and the said letter dated 4 April 2008 titled 'Kebenaran Untuk Mendakwa Bagi Kes Saman Jenayah Di Lembaga Hasil Dalam Negeri Malaysia' by the attorney general both equated to 'Written Authorization' to institute prosecution by the IRB.

[25] It was pointed out that the decision of another High Court here given on 11 March 2008 which did not favour the IRB was arrived at without hearing the merits of the case for the IRB and no written judgment for the decision was given.

[26] Among 'Consent', 'Sanction' and 'Authorization Letter', the last one is more relevant to the cause of IRB on account of the two mentioned documents (stated above) given by the Attorney General's Chambers because the charge under s 114 of the Income Tax Act 1967 is not included among the offences stated in s 129(1) of the Criminal Procedure Code.

[27] Section 30(1) of the Inland Revenue Board of Malaysia Act 1995 clearly provides that written authorisation from the public prosecutor is necessary for IRB to conduct prosecution and in doing so, it is subject to whatever directive issued by the public prosecutor.

[28] Thus, such prosecution carried out by IRB until today has been in compliance with the law and with authorisation from the public prosecutor and the preliminary objection (PO) raised is baseless and should be dismissed.

ISSUE

[29] In view of art 145(3) of the Federal Constitution, is the Inland

Revenue Board given the discretion by the Inland Revenue Board of Malaysia Act 1995 to institute court proceedings by itself without having to obtain the authorisation first from the public prosecutor?

FINDINGS OF THE COURT

[30] The court notes that art 145(3) of the Federal Constitution confers discretion on the attorney general in exercising his power to institute, conduct or discontinue any proceedings for an offence. A scrutiny of s 30(1) of the Inland Revenue Board of Malaysia Act 1995 shows that 'Proceedings in respect of any offence ... *may* with the consent of the public prosecutor, be conducted by an officer of the Board ...'.

[31] In *Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Semenanjung Malaysia & Anor* [2000] MLJU 825; [2001] 8 CLJ 416, the High Court held that:

> In general acceptation, a proceedings is an act which is done by the authority or direction of the court, express or implied, an act necessary to be done in order to attain a given end; a prescribed mode of action for carrying into effect a legal right ... including all possible steps in action from its commencement to the execution of judgment.

[32] In *Free Online Dictionary, Thesaurus and Encyclopedia* (Google) on the internet, the word 'proceeding', inter alia, means the instituting or conducting of legal action (*The American Heritage Dictionary of the English Language* (4th Ed, 2000).

[33] It further defines 'Proceeding' — Legal Definition:

> The orderly sequence of events that constitute the progression of a lawsuit or judicial procedure from the time of commencement, through all acts and occurrences, until and including the execution of the final judgement.

[34] In the Court of Appeal case of *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440; [1998] 2 CLJ 266, it held that:

> When a provision in a statute uses permissive language such as 'may', it is a question of Legislature intent, dependent upon a number of factors, whether the intended result is mandatory or directory. It is therefore wrong to assume as a matter of course that whenever Parliament uses the word 'may' in a statute it never means 'must'.

[35] Therefore guided by the definition on 'proceeding' seen above, it not only incorporates the concept of instituting criminal proceedings but also the conducting of such proceedings.

[36] The definition of 'may' as gleaned from the said *Kekatong* case decided by the Court of Appeal means that to find out whether the intended result is mandatory or directory within the context of s 30(1) of Act 533 in this present case, this court must be aware that it depends upon a number of factors.

[37] Reverting to s 30(1) of Act 533, this court views that the word 'may' only means directory and not mandatory.

[38] 'Proceedings' includes the instituting of criminal proceedings and conducting it.

[39] The court views that by choosing to use the word 'discretion' in the provision of art 145(3) of the Federal Constitution, it can only mean that Parliament empowers the attorney general with the discretion either to exercise the said power himself or to delegate it to his subordinate officer or to an authorised head of any government department/body but it is nevertheless still subject to the powers of the public prosecutor.

[40] Probably, in view of the multiple duties and some of them are very important that the attorney general has to perform for the nation, it is not pragmatic that he alone should exercise the said power.

[41] In other words, the IRB is given discretion when instituting proceedings in respect of any offence under Act 533 or any regulations made thereunder or any of the Acts specified in the Second Schedule or any subsidiary legislation made under any of those Acts on whether it thinks that it needs to ask for the consent of the public prosecutor to do so, that is to institute and conduct such proceedings. This court views that it is not mandatory that it must first seek such consent or sanction or written authorisation to do so.

[42] This is so because s 6(1) of Act 533 states that the Inland Revenue Board shall consists of the attorney general or his representative among others as members of its board.

[43] Section 10 of the same Act lists down the various functions of the board and s 10(d) states:

to perform such other functions as are conferred on the Board by any other written law.

[44] By virtue of the existence of ss 6 and 10 embodied in Act 533, it is implicit that the attorney general or his representative on the board has given the discretion to the IRB to institute and conduct the proceedings mentioned in s 30(1) of the same Act but the power given is subject to the powers of the public prosecutor under art 145(3) of the Federal Constitution by the mere presence of the attorney general or his representative as members of the board.

[45] In coming to this conclusion, the court is guided by the Court of Appeal case of *Pai San & Ors v Public Prosecutor* [2002] 4 MLJ 538; [2002] 4 CLJ 547, Abdul Hamid Mohamad JCA (as His Lordship then was) opined:

> In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a proceedings for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested in the public prosecutor by art 145(3) of the Federal Constitution.
>
> Any authoristion given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorised is void.
>
> *However, so long as the power given to another person is subject to the powers of the public prosecutor under art 145(3) of the Federal Constitution, it is valid.*
>
> As noted by the learned former Chief Justice, in such a situation 'the powers of the public prosecutor is not taken away from him and given to somebody else. His powers remain intact. It is he and he alone who may institute or give consent for a prosecution. This is consistent with his powers under art 145(3) of the Federal Constitution.

[46] The contention of learned counsel that Penang High Court Criminal Revision No 43–3 of 2009 supports his PO is baseless as it was decided on an expired sanction.

[47] The court cannot comment on the other case (Penang High Court Criminal Revision No 43–17 of 2007) as the facts are too scanty.

[48] Therefore the Inland Revenue Board is granted the discretion by the Inland Revenue Board of Malaysia Act 1995 to institute court proceedings by itself without having first to obtain the authorisation from the public prosecutor. In consequence upon the findings of the court, the charges against both the accused are not unconstitutional and they do not violate art 145(3) of the Federal Constitution.

[49] For the aforesaid reasons, the same preliminary objection raised in both cases is dismissed and that both cases are to be remitted to the magistrates' court to be heard.

Preliminary objection dismissed.

Reported by Andrew Christopher Simon